

**Before the  
Federal Communications Commission  
Washington, DC 20554**

In the Matter of:	)	
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991	)	
	)	
Petition of Paul Armbruster for Declaratory Ruling	)	DA-19-671

**REPLY COMMENTS OF JOHN A. SHAW**

September 2, 2019  
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## INTRODUCTION

These comments are made in reply to the opposition of AT&T<sup>1</sup> to the petition for declaratory ruling filed by Paul Armbruster to this docket<sup>2</sup> and to the comments filed by CTIA in response to the Commission's Public Notice seeking comment on the petition<sup>3</sup>. Mr. Armbruster seeks a ruling, "confirming that a cellular phone customer can revoke consent to receive any and all unwanted text messages from their cell service provider."<sup>4</sup>

The term "call" as used herein includes short message service (SMS or text) messages.<sup>5</sup>

I comment as a telephone consumer only. I have no business relationship with cellular telephone carriers other than being a consumer of cellular telephone service. Like the petitioner, I receive text messages, in addition to paper statements, acknowledging that payments have been automatically charged to me. Although I have not asked for these messages to stop, I should have the right to do so if I wish.

I support Mr. Armbruster's petition for declaratory ruling.

## REPLY TO AT&T OPPOSITION

### *The TCPA applies to wireless carriers and does not grant them an exemption*

AT&T, in their opposition, asserts that the TCPA "does not apply to wireless service providers' communications with their customers for which the customers are not charged."<sup>6</sup> They base that assertion on § 227(b)(1)(A)(iii).

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<sup>1</sup> Opposition of AT&T to the Petition of Paul Armbruster filed by AT&T on August 19, 2019 to this docket.

<sup>2</sup> Petition of Paul Armbruster for Declaratory Ruling or Alternatively A Rulemaking Regarding A Consumer's Absolute Right to Revoke Consent to Receive Unwanted Text Messages from Common Carriers, CG Docket No. 02-278 (filed July 9, 2019) ("Petition").

<sup>3</sup> Comments of CTIA in response to the Commission's Public Notice in this docket (July 18, 2019) ("CTIA comments").

<sup>4</sup> Petition at 4.

<sup>5</sup> See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, 18 FCC Rcd 14014 ¶ 165 (2003) ("2003 TCPA Order")

<sup>6</sup> AT&T Opposition at 1.

After the TCPA was enacted and after the 1992 TCPA order, Congress enacted § 227(b)(2)(C) of the TCPA that allowed the Commission to exempt those calls. That subparagraph states that the Commission

*may, by rule or order, exempt from the requirements of paragraph (1)(A)(iii) of this subsection calls to a telephone number assigned to a cellular telephone service that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights this section is intended to protect;*<sup>7</sup>

Because of the word “may”, that subparagraph allows, but does not require, the Commission to exempt from the TCPA such calls that are not charged to the called party. While Congress did allow the Commission to make the exception, they made the allowance subject to the privacy rights that Section 227 is intended to protect.

Clearly Congress would not have added that subparagraph to permit the exception if they intended § 227(b)(1)(A)(iii) to require the same exception. Because § 227(b)(2)(C) was added after § 227(b)(1)(A)(iii) was enacted, the former applies and the Commission has the authority, but not a requirement, to exempt such calls.

Even if there had been no change, § 227(b)(1)(A)(iii) only created an exemption from the need to obtain prior express consent and did not affect the consumers’ right to revoke that consent. While the TCPA is silent on the consumers’ right to revoke consent, the Commission pointed out in their 2015 TCPA order that, “in light of the TCPA’s purpose, any silence in the statute as to the right of revocation should be construed in favor of consumers.”<sup>8</sup>

***There is no sound reason for not allowing consumers to revoke permission for text messages.***

AT&T states that “There is no sound policy rationale for the Commission to impose new limits on the ability of a wireless service provider to communicate with its customers.”<sup>9</sup> I disagree. Although the customer is not charged for a text message, the many people who use text messages rarely and only for important communications that need immediate attention will be seriously

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<sup>7</sup> Pub. L. 102-556 (1992), 106 STAT. 4181, 4195, (adding 47 USC 227(b)(2)(C)), (emphasis added)

<sup>8</sup> Declaratory Ruling and Order, 30 FCC Rcd 7961 ¶ 107 *et seq.* (2015) (“2015 TCPA Order”), quoting *Gager v. Dell Financial Services, LLC*, 727 F.3d 265, 270 (3rd Cir. 2013)

<sup>9</sup> AT&T Opposition at 11.

inconvenienced by unnecessary text messages. For example, a person may be driving a car and have to pull off the road to check to see what text message was received. Such a person might rather receive communications by way of email. In their postpaid Wireless Customer Agreement AT&T specifically list email as one of the ways they may use to contact the customer and provides information about how the email address can be updated.<sup>10</sup>

AT&T provides reasons why some of their customers may prefer text messages rather than email<sup>11</sup>, but those reason do not apply to all customers. Email also has advantages, such as ease of long term storage using specialized folders, ease of forwarding, etc.

Although AT&T may send marketing information by email rather than by text message, some other carriers use text messages for advertising. For example, the text messages shown in the comments of Justin T. Holcombe are clearly advertising.<sup>12</sup>

A customer should be able to opt-out or revoke consent for text messages, allowing email to be used for messages required by law or necessary for proper use of the service. A customer should be able to opt-out of marketing messages by email or text.

## **REPLY TO CTIA COMMENTS**

### ***Revocation of consent is allowed by the TCPA***

CTIA asserts that the “Commission should reject the Petition’s request that the Commission allow consumers to revoke consent that was never required by the TCPA in the first place.”<sup>13</sup>

CTIA references the 2015 TCPA Order ¶56 as support for this assertion. In that paragraph the Commission states, “We therefore find the most reasonable interpretation of consent is to allow consumers to revoke consent if they decide they no longer wish to receive voice calls or texts.”<sup>14</sup>

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<sup>10</sup> AT&T Wireless Customer Agreement § 1.11, available at <https://www.att.com/legal/terms.wirelessCustomerAgreement.html#whatIsTheTermOfMyService>.

<sup>11</sup> AT&T Opposition at 3.

<sup>12</sup> Comments of Justin T. Holcombe to this docket at 7 and 8.

<sup>13</sup> CTIA Comments at 8.

<sup>14</sup> 2015 TCPA Order ¶ 56

As CTIA pointed out in its comments, “[t]he Commission reiterated, ‘consumers have a right to revoke prior consent, using any reasonable method including orally or in writing.’”<sup>15</sup>

CTIA claims that no TCPA consent is required, and states that the “Wireless Service Provider Exemption is grounded in § 227(b)(1)’s clear language. . . .”<sup>16</sup> However, the TCPA was amended by § 227(b)(2)(C) which allows, but does not require, the exemption. The Commission “may, by rule or order, exempt from the requirements of paragraph (1)(A)(iii) of this subsection calls to a telephone number assigned to a cellular telephone service that are not charged to the called party.. .” The Commission should do so “in the interest of the privacy rights this section is intended to protect.”<sup>17</sup> If the Commission, “by rule or order”, does not exempt such calls, revocation of consent would then be allowed.

***The proposed right to revoke consent has nothing to do with emergency calls***

CTIA asserts that “Denying the petition would. . . avoid an improper extension of TCPA liability to emergency and other calls. . .” and that “calls and texts subject to the Wireless Service Provider Exemption are no different from “emergency purposes” communications . . . .”<sup>18</sup>

The exemption for calls made for emergency purposes appears in § 227(b)(1)(A) and § 227(b)(1)(A)(i), but not in § 227(b)(1)(A)(i) or § 227(b)(2)(C). The ruling requested in the petition will have no effect on emergency calls.

***The notification requirement in the CTIA code does not require text messages***

CTIA points to the consumer protection afforded by the provider to consumer communications and makes reference to the CTIA Consumer Code for Wireless Service. That code does require wireless carriers to provide certain notices to their customers but does not require that the notices be delivered by text message rather than email or other means.<sup>19</sup>

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<sup>15</sup> CTIA Comments at 10, quoting Declaratory Ruling, 31 FCC Rcd 9054 ¶ 25 (rel. Aug. 4, 2016). *See also* 2015 Omnibus TCPA Declaratory Ruling, FCC 15-72, ¶ 64.

<sup>16</sup> CTIA Comments at 8.

<sup>17</sup> 47 U.S.C. § 227(b)(2)(C).

<sup>18</sup> CTIA Comments at 8, 9, and 10.

<sup>19</sup> *See CTIA Consumer Code for Wireless Service*, available at <https://www.ctia.org/the-wireless-industry/industry-commitments/consumer-code-for-wireless-service>, last viewed 9/1/2019.

### ***For many consumers “Bill Shock” is not a problem***

CTIA opposes the petition because texts, when a payment is automatically charged, can help prevent “bill shock.” Some customers may prefer to be notified by their cellular providers when automatic payments are made. Some of them may prefer text messages. However, there are customers who have unlimited digital and voice plans and therefore pay a fixed amount per month. Customers also often get copies of their cellular telephone bills sent by email or may be notified about the charge by their bank or credit card company. It should be the choice of the customer whether to receive notification of automatic payments and if the customer chooses to receive them, whether to use email or text message.

### **RULEMAKING**

If the Commission decides that a declaratory judgment is not appropriate, the Commission should begin the rulemaking process to rule that consumers have the right to revoke permission for text messages. For those messages that are legally required the information can be delivered by other means, such as email.

The Commission has the authority to abolish or to limit the wireless service exemption because § 227(b)(2)(C) permits, but does not require, the Commission to exempt wireless service providers and makes any such exemption “subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights this section is intended to protect.”<sup>20</sup>

### **CONCLUSION**

The TCPA allows the Commission to grant an exemption from the TCPA requirements for calls and text messages from a wireless service provider to their customer if the message is not charged to the customer. It does not require such an exemption. The TCPA also does not prevent the Commission from allowing a wireless customer to revoking consent for such calls.

Although there are sound reasons why many consumers will want to allow communications from wireless providers, the consumer should have the ability to choose not to receive such communications by text message and revoke consent for such text messages.

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<sup>20</sup> 47 U.S.C. § 227(b)(2)(C).

I urge the Commission to issue a declaratory ruling that consumers may revoke consent to receive text messages from wireless telephone providers or to begin a rulemaking proceeding to adopt rules that would allow the revocation of consent.

Respectfully submitted,

John A. Shaw